

STATE OF MICHIGAN
COURT OF APPEALS

RENIE MANZELLA and JOSEPH MANZELLA,

Plaintiffs-Appellants,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee,

and

ISREAL MALDONADO MORADO,
FERNANDO OJEDA MIRANDA, and
PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendants.

UNPUBLISHED

January 4, 2007

No. 271365

Van Buren Circuit Court

LC No. 05-053501-NI

Before: Meter, P.J., and O'Connell and Davis, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent.

Plaintiff Renie Manzella drove her vehicle into the rear end of defendant's uninsured motor vehicle and now claims under the terms of her insurance policy that she is entitled to uninsured motorist coverage. The trial court ruled that plaintiff's own negligence was over 50 percent the cause of the collision, and therefore, pursuant to the policy, she was not entitled to uninsured motorist benefits. I would affirm the decision of the trial court.

Plaintiff, who had an automobile insurance policy providing uninsured motorist coverage issued by defendant, was involved in an automobile accident on October 4, 2003. Apparently, she was driving behind a vehicle operated by Israel Morado and owned by Fernando Miranda. Neither Morado nor Miranda had automobile insurance for that vehicle. Morado drove his vehicle into the rear of a vehicle on the road at a point where traffic was stopped, and Renie drove her vehicle into the rear of the Morado/Miranda vehicle.

Defendant denied plaintiffs' claim for uninsured motorist coverage. Plaintiffs filed this suit alleging (1) claims against Morado and Miranda based on Morado's negligence in causing the accident, and (2) claims against defendant based on an allegation that it was obligated to provide uninsured motorist coverage based on the liability of Morado and Miranda. Defendant denied liability on the ground that Renie's own negligence was either solely or over 50 percent the cause of her collision with the Morado/Miranda vehicle. Morado and Miranda did not participate in the litigation, and defendant made no attempt to represent them. Eventually, plaintiffs entered a default against Morado and Miranda. The trial court granted summary disposition in favor of defendant under MCR 2.116(C)(10) on the ground that Renie was over 50 percent at fault for the accident. Nevertheless, the trial court subsequently entered a default judgment against Morado and Miranda for \$174,000 in excess economic losses and \$200,000 for non-economic losses.

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendant because, under the language of the relevant uninsured motorist policy, they were entitled to uninsured motorist coverage. They assert that by virtue of the default and default judgment entered against the owner and driver of the uninsured vehicle and the language of the relevant insurance policy, they were "legally entitled to collect damages from the owner or driver of the uninsured motor vehicle" involved in the accident. Put simply, plaintiffs contend that defendant was obligated to provide uninsured motorist coverage based on the default and default judgment without being able to contest if plaintiff Renie Manzella was primarily at fault for the accident. I disagree.

We review a grant of summary disposition de novo. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc.*, 267 Mich App 708, 713; 706 NW2d 426 (2005). Also, because the essential facts of this case are undisputed, its resolution turns on interpretation of the relevant insurance policy. Interpretation of an insurance policy is likewise reviewed de novo. *Id.*

Because uninsured motorist coverage is not mandated by the no-fault act, the rights afforded by such coverage are purely contractual. *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Contractual language is given its ordinary and plain meaning. *Royal Prop Group, supra* at 715. However, "an insurance contract should be read as a whole and meaning should be given to all terms." *Id.* Such a contract "must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Id.*

The "uninsured motor vehicle" coverage portion of the relevant insurance policy includes the following language:

We [defendant] will pay damages for ***bodily injury*** an ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle***. The ***bodily injury*** must be sustained by an ***insured*** and caused by accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle***. [Emphasis in original.]

If this were the only relevant policy language, then plaintiffs' position would appear to have merit because, considered in isolation, this language would seem to require defendant to pay damages in this case; as a result of the default judgment, plaintiffs have been held "legally

entitled” to collect damages from the owner and driver of the uninsured motor vehicle based on bodily injury suffered by Renie.

However, the uninsured motorist coverage portion of the policy includes additional language that makes manifest that the above language refers only to damages that an insured is “legally entitled” to collect from an uninsured owner or driver based on the actual facts of an accident, not on the failure of an uninsured party to participate in litigation. The policy, under a subheading titled “Deciding Fault and Amount,” provides:

Two questions must be decided by agreement between the *insured* and us:

1. Is the *insured* legally entitled to collect damages from the owner or driver of the *uninsured motor vehicle*; and
2. If so, in what amount? [Emphasis in original.]

Critically, the policy includes language governing the circumstance of the parties not reaching an agreement. Specifically, if both parties consent, the matter shall be decided by an arbitration procedure that is set forth in the policy. However, if either party does not consent to arbitration (or if the two arbitrators selected by the parties do not agree on a third arbitrator), then the insured is required to file a lawsuit in the proper court against the owner or driver of the uninsured motor vehicle and defendant.

This means that the policy language contemplates the parties being required to attempt to agree on whether the insured is “legally entitled to collect damages from the owner or driver of the uninsured motor vehicle” *before* any legal proceedings are instituted against defendant or an uninsured party.¹ This must be considered as meaning that the policy provides coverage only if the insured is “legally entitled” to collect damages from an uninsured owner or driver as a result of the actual facts of the accident, i.e., if the uninsured party would be liable to the insured for breaching a duty in connection with the occurrence of the accident. In this regard, prior to the initiation of legal proceedings, an insured could be legally entitled to recover from an uninsured owner or driver only based on an actual breach of duty related to the accident. A default judgment entered during legal proceedings solely as a result of the uninsured party’s failure to participate in the case, while it might impose legal liability on the uninsured party for that failure, would not mean that the insured was legally entitled to recover damages from the uninsured party at the critical time before legal proceedings were instituted. Thus, considering the relevant policy language as a whole, *Royal Prop Group, supra* at 715, plaintiffs’ position that entry of the default and default judgment in this case established defendant’s obligation to provide uninsured motorist coverage must be rejected.

¹ In this regard, the relevant portion of the policy includes a statement that, “We are not bound by any judgment against any *person* or organization obtained without our written consent” (emphasis in original). Thus, the policy language would not allow an insured to obtain uninsured motorist coverage based on a judgment obtained in a suit against an uninsured owner or driver before making the required attempt to reach agreement on coverage with defendant.

I would affirm the decision of the trial court.

/s/ Peter D. O'Connell